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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DORIS DAY ANIMAL FOUNDATION et  
al.,

Plaintiffs and Appellants,

v.

JOSEPH DEERING et al.,

Defendants and Respondents.

B252856

(Los Angeles County  
Super. Ct. No. SC120188)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J.  
Goodman, Judge. Affirmed.

Altshuler & Spiro and Bruce J. Altshuler for Plaintiffs and Appellants.

Stephen R. Rykoff for Defendants and Respondents.

\* \* \* \* \*

Plaintiffs Doris Day Animal Foundation and National Alliance for Research on Schizophrenia and Depression (plaintiffs) appeal a judgment following the granting of defendants John Deering and Deering, Sands & Berberoglu's (defendants) motion for summary judgment on plaintiffs' claim for legal malpractice. We affirm.

### **BACKGROUND**

This legal malpractice case arose from defendants' drafting of two testamentary documents. One was the will of Anthony Ficele (hereafter Anthony),<sup>1</sup> which was prepared by defendants and executed on February 26, 2004. In it, Anthony designated plaintiffs and two other charitable foundations as residuary beneficiaries. Anthony died on March 2, 2012.

Before defendants prepared Anthony's will, defendants prepared an inter vivos trust dated January 9, 1989, for Anthony's mother Anna Ficele (hereafter Anna). The primary asset in Anna's trust was an apartment building she owned (which was eventually sold in June 2012, with net proceeds of \$1,087,902.13). On July 20, 1998, Anna executed a restatement of her trust (the restatement), also prepared by defendants. Article 9, section 2 of the restatement provided Anthony with a general power of appointment as follows:

"The trust share set aside for ANTHONY FICELE shall forthwith terminate and my Trustee shall distribute all undistributed net income and principal to ANTHONY FICELE, free of the trust.

"ANTHONY FICELE shall have the unlimited and unrestricted general power to appoint, by a valid last will and testament or by a valid living trust agreement, the entire principal and any accrued and undistributed net income of his trust share as it exists at his death. In exercising this general power of appointment, ANTHONY FICELE shall specifically refer to this power.

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<sup>1</sup> We will use first names because other individuals also have the surname Ficele; no disrespect is intended.

“ANTHONY FICELE shall have the sole and exclusive right to exercise the general power of appointment.

“This general power of appointment specifically grants to ANTHONY FICELE the right to appoint property to his own estate. It also specifically grants to him the right to appoint the property among persons, corporations, or other entities in equal or unequal proportions, and on such terms and conditions, whether outright or in trust, as he may elect.

“To the extent this general power of appointment is not exercised, my Trustee shall distribute the remaining trust property to the then living descendants of ANTHONY FICELE, per stirpes.

“If ANTHONY FICELE has no then living descendants, my Trustee shall distribute the balance of the trust property to [*sic*] one-half to my son PHILLIP FICELE or his issue by right of representation.

“If I have no then living descendants, my Trustee shall distribute the remaining trust property as provided in Article Ten of this agreement.”

Article 9, section 4 further provided, as relevant here:

“Whenever a distribution is authorized or required to be made by a provision of this Article to my beneficiary, then my beneficiary may direct my Trustee in writing to retain such distribution in trust as follows: [¶] . . . [¶]

**“d. The Beneficiary’s General Power of Appointment**

“The beneficiary shall have the unlimited and unrestricted general power to appoint, by a valid last will and testament or trust agreement, the entire principal and any accrued and undistributed net income of the trust as it exists at the beneficiary’s death. In exercising this general power of appointment, the beneficiary shall specifically refer to this power.

“The beneficiary shall have the sole and exclusive right to exercise the general power of appointment.

“This general power of appointment specifically grants to the beneficiary the right to appoint property to the beneficiary’s own estate. It also specifically grants to the

beneficiary the right to appoint the property among persons, corporations, or other entities in equal or unequal proportions, and on such terms and conditions, whether outright or in trust, as the beneficiary may elect.

“Any property in the trust which is not distributed pursuant to the exercise of the general power of appointment shall be distributed to the beneficiary’s then living descendants, per stirpes.

“If the beneficiary has no then living descendants, my Trustee shall distribute the remaining trust property as provided in Article Ten of this agreement.”

By the time Anna died on August 25, 2001, however, the restatement was not Anna’s operative testamentary document. Instead, Anna executed a first amendment to the restatement (the first amendment) on December 9, 1998, which deleted article 9 from the restatement and replaced it with a new article 9.<sup>2</sup>

Article 9, section 1, entitled “**Division into Separate Shares,**” provided:

“If at the time of my death I own the apartment house located at [address provided,] [s]aid property shall remain in this trust until the death of my son Anthony Ficele. During his life he shall have the right to all income from said asset and have the right to live on the property on [sic] any unit he chooses. At the time of his death the trustee of this trust shall distribute this apartment house in accordance with the provisions of this article. If before Anthony Ficele’s death, both of my sons agree to sell this apartment house, they may do so and distribute the proceeds in accordance with the remaining portions of this Article.

“The remaining trust property on my death and the said apartment house located at [address provided], if it is still in the trust, at the death of my son Anthony Ficele, it shall be divided into as many shares as shall be necessary to create one equal share for each of my then living children, and one equal share for each of my deceased children.”

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<sup>2</sup> The first amendment indicated the restatement was dated July 20, 1988, but the parties do not dispute that this was a typographical error and the restatement was dated July 20, 1998.

Article 9, section 2.a. governed Anthony's distribution under Anna's trust in the event he survived her, as which point "[t]he trust share set aside for ANTHONY FICELE shall forthwith terminate and my Trustee shall distribute all undistributed net income and principal to ANTHONY FICELE, free of trust." Anthony continued to have a power of appointment, but significantly, that power of appointment was limited to assets in the trust that, if distributed, would constitute a taxable generation-skipping transfer: "ANTHONY FICELE shall have the unlimited and unrestricted general power to appoint, by a valid last will and testament or by a valid living trust agreement, any property remaining in the trust share *the distribution of which would otherwise constitute a taxable generation-skipping transfer.*" (Italics added.)

The remaining power of appointment provisions were similar to the restatement, albeit with one other reference to a taxable generation-skipping transfer:

"In exercising this general power of appointment, ANTHONY FICELE shall specifically refer to this power. ANTHONY FICELE shall have the sole and exclusive right to exercise this general power of appointment.

"This general power of appointment specifically grants to ANTHONY FICELE the right to appoint property to his own estate. It also specifically grants to him the right to appoint the property among persons, corporations, or other entities in equal or unequal proportions, and on such terms and conditions, whether outright or in trust, as he may elect.

"Any property in the trust share which is not distributed pursuant to the exercise of the general power of appointment or is not subject to such power because it is not taxable as a generation-skipping transfer shall be distributed to ANTHONY FICELE's then living descendant, per stirpes.

"If ANTHONY FICELE has no then living descendants, my Trustee shall distribute the remaining trust property to my then living descendants, per stirpes.

"If we have no then living descendants, my Trustee shall distribute the remaining trust property as provided in Article Ten of this agreement."

Article 9, section 2.b. of the first amendment contained the exact same provisions for Anthony's brother, Phillip.

Article 9, section 4 in the first amendment was substantively identical to article 9, section 4 in the restatement, so it continued to provide a general power of appointment “[w]henever a distribution is authorized or required to be made by a provision of this Article to any beneficiary . . . .”

There is no dispute Anthony's will did not refer to Anna's trust or to the power of appointment thereunder. As a result, after Anthony died, Phillip filed a petition in Los Angeles Superior Court for instructions regarding the distribution of Anna's assets, claiming Anthony did not exercise the power of appointment and had no living descendants, so under the terms of the first amendment, Anna's assets should be distributed to Phillip. The probate court agreed and ordered all of Anna's assets be distributed to Phillip.

Plaintiffs thereafter filed the instant malpractice complaint against defendants, alleging defendants (1) knew of the power of appointment provisions in Anna's trust, (2) knew Anthony wanted to leave his residual estate to the charities named in his will, (3) owed a duty to Anthony and plaintiffs to draft his will to ensure his bequests succeeded in light of Anna's trust, and (4) breached that duty by failing to refer to Anthony's power of appointment in compliance with Anna's trust. According to plaintiffs, had defendants drafted Anthony's will properly, they would have each been entitled to 12.5 percent (\$146,900) of the net proceeds from the sale of the apartment building (Anthony's half of \$1,175,197.76 in net proceeds, divided by four charitable beneficiaries).

Plaintiffs made several pleading errors in their original complaint. First, they referred to the first amendment in the body of the complaint, but quoted language from the power of appointment in the restatement. Second, the damage figure was incorrect—the net proceeds from the sale of the apartment building were \$1,087,902.13, which would amount to roughly \$135,988 for each plaintiff. Finally, they omitted allegations related to one of the elements of duty for their malpractice claim.

With a summary judgment motion imminent, on August 15, 2013, plaintiffs filed an ex parte application to expedite hearing on a planned motion to amend their complaint. Defendants intended to oppose the motion to amend but agreed to expedite the hearing. The trial court nonetheless denied the ex parte application, forcing plaintiffs to file the motion to amend and set the hearing date for January 2014, well beyond the anticipated October 9, 2013 hearing date for the summary judgment motion. The trial court apparently never heard or ruled on the motion to amend, instead entering judgment on the motion for summary judgment before the scheduled hearing on the motion.

As planned, defendants moved for summary judgment and set the hearing for October 9, 2013. They asserted two grounds. First, plaintiffs could not establish “but for” causation because the power of appointment in the first amendment was limited to assets that, upon distribution, would have constituted a taxable generation-skipping transfer, and because Anthony had no children, he had no such assets. Second, they owed no duty to plaintiffs as nonclient potential beneficiaries, citing *Chang v. Lederman* (2009) 172 Cal.App.4th 67 (*Chang*). Further, defendants anticipated plaintiffs would rely on article 9, section 4.d. of the first amendment to argue Anthony had a general power of appointment over all the assets in Anna’s trust at his death, notwithstanding the limitation to taxable generation-skipping transfers in article 9, section 2.a.<sup>3</sup>

In opposition, plaintiffs argued as anticipated that Anthony had a general power of appointment under article 9, section 4.d. notwithstanding the more limited power of appointment in article 9, section 2.a. In support of this contention, they cited portions of defendant Joseph Deering’s deposition, during which he did not claim Anthony lacked a general power of appointment or his power of appointment was limited to generation-skipping transfers. Plaintiffs also distinguished *Chang* and argued defendants owed them a duty of care under *Lucas v. Hamm* (1961) 56 Cal.2d 583.

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<sup>3</sup> Plaintiffs did not clearly allege reliance on article 9, section 4.d. in their original complaint, but did so in their proposed amended complaint.

Accompanying the opposition, plaintiffs requested judicial notice of three documents: (1) Phillip's petition to the probate court for instructions regarding the manner in which the trust assets should be distributed, (2) the order granting Phillip's petition, (3) and their motion to file a first amended complaint. Plaintiffs also submitted an expert declaration from Attorney Sussan Shore, who opined on several issues as discussed *post*.

In reply, in addition to rebutting plaintiffs' arguments, defendants objected to Shore's expert declaration on the grounds that it constituted an improper opinion on an issue of law and was otherwise irrelevant. Defendants also argued the trial court should not take judicial notice of Phillip's probate petition and the probate court's order because they were irrelevant to the issues in the malpractice case.

The trial court granted defendants' motion, finding (1) because there was no distribution creating generation-skipping tax liability under article 9, section 2.a., Anthony's power of appointment was not created and his gift to plaintiffs was never possible; (2) article 9, section 4.d. did not apply; and (3) defendants owed no duty to plaintiffs pursuant to *Chang*. As for the evidentiary issues, the court excluded Shore's expert declaration entirely. It took judicial notice of only the existence and filing of the probate petition and declined to judicially notice the probate court order as irrelevant. The trial court entered judgment accordingly, and plaintiffs timely appealed.

### **DISCUSSION**

On appeal, plaintiffs challenge the trial court's summary judgment rulings on causation and duty. They also challenge the court's judicial notice ruling and the court's exclusion of Shore's expert declaration. Finally, they challenge the court's refusal to hear the motion to amend their complaint before deciding the summary judgment motion. We find no error with the trial court's evidentiary rulings. We also conclude the trial court properly granted summary judgment on the issue of causation, so we will assume without deciding that defendants owed plaintiffs a duty of care. We reject plaintiffs' challenge to the trial court's refusal to hear their motion to amend prior to granting summary judgment.



## ***1. Evidentiary Rulings***

To place the trial court's summary judgment ruling in proper context, we will briefly address plaintiffs' evidentiary claims. We review the court's evidentiary rulings for abuse of discretion. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 536 [judicial notice]; *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1168 (*Summers*) [admission of expert testimony].) We find no error.

Plaintiffs argue the trial court erred in refusing to take judicial notice of the truth of the allegations in Phillip's probate petition and the probate court's order. Plaintiffs requested judicial notice pursuant to Evidence Code section 452, subdivision (d), which permits a court to take judicial notice of the records of "(1) any court of this state or (2) any court of record of the United States or of any state of the United States." A court generally may not take judicial notice of the truth of the facts contained in court records, however. (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1568.) In their appellate briefs, plaintiffs do not address this rule or demonstrate why the trial court abused its discretion in applying it. Instead, they focus entirely on the alleged *effect* judicial notice might have had in this case. Absent any argument undermining the trial court's ruling, we find no error.

Plaintiffs also claim the trial court erred in refusing to consider the declaration from their legal expert Shore. She opined on the following issues: (1) the interpretation of the provisions in the restatement and first amendment to Anna's trust, (2) an attorney's duty to refer to a power of appointment in a will for a client who holds a power of appointment, (3) defendants' breach of that duty under the current circumstances, (4) the causal link between the failure to specify the exercise of the power of appointment in Anthony's will and the failure of his bequest to plaintiffs, and (5) plaintiffs' standing to bring the malpractice claim under the relevant factors related to duty in this circumstance.

The trial court excluded her declaration because "the questions to be [decided] are matters of law; expert opinion is not admissible," citing *Summers* and *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953. As discussed below, we limit our opinion to the issue of causation, so we need not address Shore's opinions on any point other than her

interpretation of Anna's trust and on causation. On those issues, Shore's declaration reads like a legal brief in plaintiffs' favor. The trial court did not abuse its discretion in excluding Shore's opinions on those points. (See *Summers, supra*, 69 Cal.App.4th at pp. 1178-1180.)

## **2. Summary Judgment**

"Summary judgment or summary adjudication is appropriate when no triable issues of material fact remains and the moving party is entitled to judgment or adjudication as a matter of law. [Citations.] A trial court's decision on a motion for summary judgment or summary adjudication is reviewed de novo, viewing the evidence in the light most favorable to the nonmoving party." (*Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1548; see Code Civ. Proc., § 437c, subds. (c), (f).)

In order to prevail on a legal malpractice claim, a plaintiff must show "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) To show causation, a plaintiff must demonstrate through a "trial within a trial . . . that, but for the lawyer's negligence, the client would have prevailed in the underlying action." (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864.) While causation is ordinarily a question of fact, the issue of causation may be decided as a question of law if, under undisputed facts, there is no room for a reasonable difference of opinion. (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1583.)

To demonstrate causation under the facts of this case, plaintiffs must show, but for defendants' failure to include Anthony's power of appointment in his will, plaintiffs would have received Anthony's share of Anna's trust assets when Anthony passed away. That in turn rests on the proper interpretation of the power of appointment provisions in the first amendment to Anna's trust. If Anthony's power of appointment was limited to taxable generation-skipping transfers, no such assets existed and Anthony would not have

had any power of appointment to exercise. As a result, plaintiffs would have taken nothing under Anthony's will, even if defendants had included a power of appointment. On the other hand, if the first amendment to Anna's trust granted Anthony a general power of appointment, then defendants' failure to include the power of appointment in Anthony's will caused the failure of Anthony's bequest to plaintiffs.

“‘[T]he primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor.’” (*Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1206.) “The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.” (Prob. Code, § 21102, subd. (a).) In interpreting the trust document itself, “[t]he words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer.” (Prob. Code, § 21120.) Further, “[a]ll parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument.” (Prob. Code, § 21121.)

We also consider “‘the circumstances under which the document was made so that the court may be placed in the position of the testator or trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite, or ambiguous in some respect. [Citation.] Thus, extrinsic evidence as to the circumstances under which a written instrument was made is admissible to interpret the instrument, although not to give it a meaning to which it is not reasonably susceptible. [Citation.] On review of the trial court's interpretation of a document, the appellate court's proper function is to give effect to the intention of the maker of the document.’” (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73 (*Ike*).) The interpretation of a trust presents a question of law unless the interpretation turns on the credibility of extrinsic evidence. (*Ibid.*)

Although plaintiffs argue otherwise, there is no ambiguity in the power of appointment provisions in the first amendment and Anna's clear intent was to limit Anthony's power of appointment to taxable generation-skipping transfers. Article 9, section 2 provided a complete plan of distribution for each child who survived Anna, and article 9, section 2.a. set forth the complete plan for Anthony. In that section, Anthony's power of appointment was expressly limited to taxable generation-skipping transfers. Any assets not subject to this power of appointment would be distributed to Anthony's descendants, and if Anthony had no descendants (which he did not), the assets would go to Phillip. Because none of Anna's assets were subject to taxable generation-skipping transfers, Anthony had no assets to appoint to plaintiffs and defendants could not have caused plaintiffs' loss by not including Anthony's ineffective power of appointment in his will.

Plaintiffs attempt to avoid this conclusion by relying on article 9, section 4.d. of the first amendment, which set out a more general power of appointment, but that provision did not apply to Anthony. As defendants point out, that provision had a condition precedent to its operation: according to its introductory clause, it only applied "[w]henever a distribution is authorized or required to be made by a provision of this Article to any beneficiary . . . ." The only way Anthony would have been a "beneficiary" receiving a distribution "authorized or required to be made by a provision of this Article" is through article 9, section 2.a., the "**Distribution of trust share for ANTHONY FICELE.**" But because Anthony did not have a power of appointment over any assets subject to taxable generation-skipping transfers, and he had no descendants, all of Anna's assets went to Phillip. Anthony therefore could not have been a beneficiary receiving a distribution pursuant to article 9 that would have triggered any general power of appointment in article 9, section 4.d.<sup>4</sup>

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<sup>4</sup> Plaintiffs argue Anthony was not required to give himself notice of his election to exercise his power of appointment pursuant to article 9, section 4.d. Defendants have not raised that argument on appeal. In any case, that issue is beside the point because article 9, section 4.d. was not triggered.

Article 9, section 4.d. also gave the beneficiary the power of appointment over “the *entire* principal and any accrued and undistributed net income of the trust as it exists at the beneficiary’s death.” (Italics added.) That provision makes sense if article 9, section 4.d. is triggered when there are no assets subject to a generation-skipping transfer and a beneficiary (i.e., Phillip) has received all of Anna’s assets by operation of article 9, section 2. Under plaintiffs’ interpretation, however, this provision would have given Anthony a general power of appointment over *all* of the assets in Anna’s trust, not just his share, effectively leaving Phillip with nothing. That is inconsistent with the terms of the first amendment dividing Anna’s assets into equal shares for her children. Even plaintiffs do not contend Phillip should have received nothing under the first amendment.

Plaintiffs argue this interpretation renders article 9, section 4.d. superfluous, but it does not. Article 9, section 4.d. did not apply only to Anthony; instead, it applied to any beneficiary under Anna’s trust, which included Phillip. Article 9, section 1 provided that, at Anthony’s death, Anna’s assets would be divided into equal shares for Anna’s living and deceased children, i.e., one share for Anthony and one for Phillip.<sup>5</sup> When Phillip received Anthony’s share of Anna’s assets by operation of article 9, section 2.a., he became a beneficiary receiving a distribution, which triggered article 9, section 4. Had Phillip elected to retain the assets in a new trust, he could have obtained the general power of appointment under article 9, section 4.d. Thus, article 9, section 4 remained operative as to Phillip even if it did not as to Anthony.

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<sup>5</sup> The trial court found the term “share” in article 9, section 1 referred to “a trust administration concept and not to a conveyance . . . disposition of the apartment building or its proceeds is controlled by the trust document.” Plaintiffs dispute this interpretation, but it must be correct. If article 9, section 1 constituted an actual distribution to Anthony of half of Anna’s assets, then his share would have been an asset in his estate and would have passed to plaintiffs under his will, regardless of any power of appointment. This interpretation would render the rest of the first amendment, including the power of appointment provisions, superfluous. This interpretation would also defeat causation for plaintiffs’ malpractice claim—if Anthony did not have to exercise his power of appointment for plaintiffs to receive his bequest, then defendants’ failure to include the power of appointment in Anthony’s will did not cause their injury.

This interpretation also comports with Anna's intent as reflected in the first amendment and the surrounding circumstances. Anna initially included two power of appointment clauses in the restatement: Article 9, section 2, which applied to Anthony on similar terms as article 9, section 2.a. of the first amendment but without the generation-skipping transfer limitation; and article 9, section 4, which contained an identical power of appointment to article 9, section 4 of the first amendment. The first amendment replaced article 9, section 2 with a power of appointment only for assets subject to taxable generation-skipping transfers for both Anthony and Phillip. By doing so, Anna must have intended to limit Anthony's power of appointment to generation-skipping transfers. Otherwise, the change in article 9, section 2 would have had no effect.

Plaintiffs claim this could not have been Anna's intent because she "lived in the same apartment complex next to her son Anthony until her death, and designated Anthony as her successor Trustee, and granted Anthony 100% of the . . . apartment income after her death." But those facts are consistent with the first amendment, which ensured Anthony received income from the apartment building and was able to live there while he was alive. There is nothing inconsistent with Anna ensuring Anthony was cared for while he was alive while also limiting his power of appointment over assets after his death.

Plaintiffs also argue excerpts from defendant Deering's deposition were inconsistent with his summary judgment declaration, and he never asserted Anthony's power of appointment was limited to generation-skipping transfers, which created a triable issue of fact over Anna's intent. But none of this evidence actually pertained to Anna's intent. The deposition excerpts related to Anthony's intent in drafting his will, and defendant Deering's awareness that Anthony had a power of appointment under the

first amendment. Defendant Deering's declaration was largely foundational and did not refer to Anna's intent.<sup>6</sup> Thus, this evidence cannot defeat summary judgment.

Finally, plaintiffs rely heavily on Probate Code section 21120 and several cases to argue we must interpret the first amendment to ensure Anthony had a power of appointment and did not suffer from "intestacy or failure of a transfer" in his will. They are mistaken. Under the circumstances of this case, the intestacy or failure to transfer under Probate Code section 21120 refers to Anna's trust, not Anthony's bequest to plaintiffs. Anna's trust did not fail; instead, by design Anthony did not receive any power of appointment and Phillip received the assets in the trust. Probate Code section 21120 also directs us to interpret the first amendment to "give every expression some effect, rather than one that will render any of the expressions inoperative," and as already explained, our interpretation does not render any provision inoperative. And Probate Code section 21120 reflects a *preference* for interpreting the first amendment to "prevent intestacy or failure of a transfer," rather than interpreting the first amendment to "result in an intestacy or failure of a transfer." But because the first amendment is unambiguous, there is only one interpretation and we cannot "prefer" any other.<sup>7</sup>

In sum, the plain terms of the first amendment and surrounding circumstances reflect Anna's intent to limit Anthony's power of appointment to taxable generation-skipping transfers as provided in article 9, section 2.a. Because there were no distributions that qualified as taxable generation-skipping transfers, Anthony had no power of appointment that would have enabled his bequest to plaintiffs in his will and

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<sup>6</sup> The trial court sustained plaintiffs' objections to several parts of defendant Deering's declaration, further paring down the declaration to foundational matters.

<sup>7</sup> In their reply brief, plaintiffs cite article 13, section 11 of Anna's trust (entitled "**Generation-Skipping Tax Provisions**") to support their interpretation of the first amendment. Because this argument was raised for the first time in their reply brief and defendants did not have a chance to respond, we decline to consider it. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.)

plaintiffs cannot show defendants' failure to include a power of appointment caused their loss. Summary judgment in defendants' favor was therefore proper.

### ***3. Motion to Amend Complaint***

Plaintiffs challenge the trial court's refusal to hear the motion to amend their complaint before deciding defendants' summary judgment motion. We need not decide whether the trial court erred because plaintiffs clearly were not prejudiced. They admit the trial court analyzed the first amendment to Anna's trust instead of the restatement as incorrectly alleged in their complaint. The parties and the court also thoroughly addressed plaintiffs' contention that article 9, section 4.d. of the first amendment created Anthony's power of appointment, even though plaintiffs only alleged that in their proposed amended complaint. Finally, there is no indication the trial court relied on either of the other pleading errors (incorrect damages and the omission of one duty factor) in granting defendants' motion for summary judgment.

### **DISPOSITION**

The judgment is affirmed. Respondents are awarded costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.